THE HIGH COURT

[2021] IEHC 335

[Record No. 2018/4525 P]

BETWEEN

JAMES NOLAN

PLAINTIFF

AND

TRUSTEES OF BRIDGE UNITED AFC AND PENTURF LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered electronically on the 14th day of May, 2021

Introduction

1. This action arises out of an accident on 20th December, 2016, when the plaintiff injured himself while playing football on the first defendant's astroturf pitch, which had been laid by the second defendant. The personal injury summons issued on 21st May, 2018.

2. This is an application on behalf of the first named defendant to have the order made by the High Court on 14th October, 2019, renewing the plaintiff's personal injury summons, set aside.

3. The first named defendant submits that the reason given by the High Court for renewing the summons on 14th October, 2019, which was stated in the order as follows: "In circumstances where there [sic] an administrative oversight has occurred"; did not constitute "special circumstances" as required by O.8, such as to justify the renewal of the summons. Accordingly, it is submitted that the court should set aside the renewal of the personal injury summons herein.

4. In response thereto, the plaintiff relies heavily on the fact that at the time when the application for renewal of the summons was made, the plaintiff's action against the defendants was not statute barred. The plaintiff was within the relevant limitation period, within which he could institute fresh proceedings arising out of the accident the subject matter of the proceedings, which had occurred on 20th December, 2016. It was submitted that these circumstances constituted "special circumstances" which justified the renewal of the summons.

5. Secondly, the plaintiff points to the fact that the first defendant had been made aware of the circumstances of the accident from a very early stage, as it had been sent a letter of claim within two months of the date of the accident. Thereafter, there had been correspondence between the plaintiff's solicitor and the insurers representing the first defendant. A joint engineering inspection had been carried out within a year of the accident. It was submitted that in these circumstances, it could not be argued that the first defendant had suffered any prejudice by the omission to serve the summons within the time prescribed by the rules.

6. Thirdly, it was submitted that, while the primary reason for the failure to serve the summons within the appropriate time, was inadvertence on the part of the plaintiff's solicitor, the plaintiff did not rely on that as being the only applicable "special circumstance" justifying the renewal of the summons; it had to be seen in conjunction

with the fact that the plaintiff was within the appropriate limitation period when the application for renewal had been made and there was no specific, or even general prejudice to the defendant in allowing the renewal of the summons herein.

7. That is a very general statement of the issues that arise for determination in this case. A more detailed account of the chronology of the relevant dates and steps taken in the action is set out in the next section of the judgment.

Relevant chronology

Key dates

8. The most pertinent dates from the point of view of this application are as follows:-

20th December, 2016	Plaintiff is injured while playing football on the astroturf football pitch at the premises of the first named defendant.
29th May, 2017	Plaintiff submits an application to PIAB.
11th October, 2017	PIAB issues an authorisation to proceed against the first defendant.
24th April, 2018	PIAB issues an authorisation to proceed against the second defendant.
21st May, 2018	Personal injury summons is issued.
20th May, 2019	Time for service of personal injury summons expired.
27th August, 2019	Plaintiff's solicitor becomes aware that the summons had not been served on either defendant.
14th October, 2019	Order made by High Court renewing the summons.
17th November, 2019	Expiry of limitation period for action against first defendant.
20th November, 2019	The renewed summons is served on the first defendant.
27th April, 2020	First defendant issues motion to set aside renewal of the summons.

Relevant correspondence

9. In addition to the key relevant dates outlined above, it is necessary to give a brief outline of certain items of correspondence which passed between the parties. This correspondence is relevant to the issue of prejudice, or the lack thereof, to the first defendant, in relation to its ability to investigate the incident and defend the interests of the first defendant in these proceedings.

10. As already noted, the plaintiff's action arises out of an accident that occurred on 20th December, 2016, when he was playing football on the first defendant's astroturf pitch. In essence, the plaintiff's complaint is that there was a concrete lip either adjacent to, or

behind, one of the goals and due to the presence thereof, he was caused to trip and fall to the ground, suffering injury to his right knee.

11. By letter dated 14th February, 2017, the secretary of Bridge United AFC was put on notice of the claim. The following description was given of the accident:-

> *"Our client was playing football as a visitor at the grounds when he fell to the ground and severely injured his right knee. The injury was caused by a negligently constructed concrete lip beside/behind one of the goals. Clearly this lip should not have been in an area so proximate to the playing surface and the accident in all circumstances was reasonably foreseeable."*

12. On 29th May, 2017 the plaintiff's solicitor wrote a further letter to the first defendant. He also submitted Form A to PIAB, seeking damages from the first defendant in respect of the injuries sustained by his client. In the application form, the accident was described as "Claimant fell against concrete lip while playing football on the respondent's property".

13. By letter dated 28th June, 2017, Mr. Leo McFeely of the Claims Department of Allianz, informed the plaintiff's solicitor that his letter of 29th May, 2017 had been passed to them by their policyholder. In that letter Mr. McFeely requested full details of the accident circumstances; detailed allegations of negligence on the part of the policyholder; the identity of any witnesses and the plaintiff's solicitor was asked to provide full particulars of his client's claim.

14. The plaintiff's solicitor responded to that correspondence by letter dated 3rd July, 2017, in which he stated that it was his client's case that the concrete lip should not have been situated at the locus, as it constituted a hazard. He went on to state that they would be prepared to arrange a joint inspection of the locus of the accident in due course. He indicated that they intended to instruct Mr. Michael Fogarty, Engineer, to act on behalf of the plaintiff. He went on to confirm the plaintiff's PPS number and his date of birth. He also enclosed a copy of a medical report dated 30th March, 2017 from the plaintiff's doctor.

15. Allianz responded by letter dated 7th July, 2017, wherein they stated that their investigations were in hand and when complete they would furnish their view on liability. The letter inquired whether the request for an inspection by the plaintiff's engineer might be premature, bearing in mind that the plaintiff did not appear to have made a formal application to the Injuries Board. Obviously, the insurers were unaware of the application that had been lodged with PIAP on 29th May, 2017.

16. That misapprehension was corrected shortly thereafter, because by letter dated 27th September, 2017, Allianz informed the plaintiff's solicitor that they had informed PIAB that they were not to assess the case, in which circumstances, an authorisation would issue to the plaintiff's solicitor in due course. The plaintiff's solicitor was asked to furnish a copy of the proceedings that he intended to issue on behalf of his client. It was

indicated that on receipt of same, the insurers would appoint an appropriate firm of solicitors to accept service and would allow the plaintiff's engineer to inspect the locus.

17. By letter dated 2nd October, 2017, Allianz informed the plaintiff's solicitor that Mr. Tony O'Keeffe, Engineer, had been instructed to act on their policyholder's behalf. That letter also informed the plaintiff that the pitch had been installed by Penturk [sic] Limited of Springhill, Killeshin, Carlow, in 2015. Allianz had put them on notice of the plaintiff's claim.

18. In an affidavit sworn by Mr. Martin O'Carroll, the plaintiff's solicitor, on 27th October, 2020, he stated that a site inspection with the insurance company's servants or agents took place in 2017. He subsequently stated that he received a liability report from O'Reilly Engineers Limited on 21st December, 2017. Accordingly, it would appear that the joint engineering inspection must have taken place on some date between 2nd October, 2017 and 21st December, 2017.

19. While not strictly speaking germane to the application brought by the first defendant herein, it was noted by the plaintiff's solicitor that the name of the second defendant company, had been incorrectly stated in the letter from Allianz dated 2nd October, 2017. The court does not consider that there is any merit in this point in view of the fact that the correct address of the company was given and in addition, if the plaintiff's solicitor had encountered any difficulty in identifying the second defendant from the name of the company given in the correspondence, an internet search of companies in Ireland specialising in the laying of astroturf football pitches, would probably have correctly identified the company within a matter of minutes. Furthermore, this application does not concern the date of issue of the personal injury summons, but the failure to serve it in time. The company was correctly named in the summons.

20. Also not strictly germane to the application, is the fact that on 21st October, 2019, the plaintiff took the precaution of issuing a second personal injury summons in identical terms against the two defendants, seeking damages arising out of the same incident. This was done as a precautionary measure to protect the plaintiff's interests, having regard to the fact that the limitation period under the Statute of Limitations did not expire until 17th November, 2019. That second personal injury summons was served on the defendants on 22nd October, 2020.

Submissions on behalf of the first defendant

21. It was submitted on behalf of the first defendant that it was clear from the content of the affidavit which had been sworn by the plaintiff's solicitor on 10th September, 2019 for the purpose of the *ex parte* application seeking to renew the summons, that the reason put forward for why the summons had not been served within the twelve-month period provided for under the rules, was due to inadvertence on the part of the solicitor. In that affidavit, Mr. O'Carroll had stated as follows at para. 11:-

"11. Upon reviewing the file on 27th of August, 2019, I noted that due to an administration oversight on my part, the summons had not been served on either defendant."

22. Counsel for the first defendant pointed out that under O.8, r.1(4) the court could only renew the summons where it was satisfied that there were "special circumstances" which justified an extension and such circumstances had to be stated in the order. In the order of the High Court of 14th October, 2019, the special circumstance was clearly stated as being due to the fact that "an administrative oversight" had occurred.

23. It was submitted by Mr. Buckley SC on behalf of the first defendant that it was well settled in Irish law that an administrative oversight on the part of the plaintiff's solicitor was not a special circumstance which would justify the renewal of a summons. In this regard, counsel referred to the following decisions: *Moynihan v. Dairy Gold Cooperative Society Limited* [2006] IEHC 318; *Downes v. TLC Nursing Home Limited* [2020] IEHC 465 and *Murphy v. HSE* [2021] IECA 3.

24. It was submitted that insofar as the first defendant had sought at the hearing of this application to raise a further ground as constituting a special circumstance; namely the fact that at the time when the *ex parte* application was moved, the plaintiff's action against the first defendant was not statute barred and that that was a reason which justified the renewal of the summons; it was submitted that there was no evidence that any such argument had been made before the court at the *ex parte* stage. Furthermore, it was not the reason stated in the order of the High Court made on 14th October, 2019 for the renewal of the summons. It was submitted that the plaintiff could not "*graft on*" a new special circumstance, which had neither been canvassed before the court at the *ex parte* stage, nor had it been the identified special circumstance stated in the order, giving rise to the renewal of the summons on that date.

25. Without prejudice to that submission, it was further submitted that the fact that a plaintiff's action may not be statute barred at the time that the application for renewal is first made, does not constitute a special circumstance which would justify the renewal of the summons. It was submitted that it was in fact an irrelevant issue when considering whether there were special circumstances which justified a renewal of the summons, as required by the provisions of O.8 of the rules.

26. The first defendant accepted that allowing for the period during which the plaintiff's application was before PIAB and allowing six months from date of receipt of the authorisation from PIAB, the plaintiff's claim against the first defendant did not become statute barred until 17th November, 2019.

27. It was submitted that as the present action was a claim for damages for personal injuries, witness evidence would be necessary at the trial of the action. In this regard, the delay on the part of the plaintiff in prosecuting his claim against the first defendant, in particular by failure to serve the summons within the appropriate period, had caused prejudice to the first defendant, due to the fact that there would be a delay in the action

coming on for hearing; it was recognised that where liability turned on the recollection of witnesses, a delay in bringing the action on for hearing was a prejudice to the defendant in defending the proceedings. Accordingly, it was submitted that the defendant had suffered a general prejudice due to the fact that there had been delay on the part of the plaintiff in prosecuting his action against the first defendant. The court was entitled to take that into account in carrying out any balancing exercise as to where the interests of justice might lie.

28. It was submitted that having regard to the inadequacy of the matters that had been put forward as constituting special circumstances as to why the summons had not been served within the appropriate period, the court should set aside the renewal of the summons in this case.

Submissions on behalf of the plaintiff

29. Mr. Sheehan SC on behalf of the plaintiff submitted that the jurisdiction of the court when considering the first defendant's application, was akin to a *de novo* hearing on the issue of whether the summons should be renewed, albeit that the court had to look at the matter through the prism of the circumstances that existed on the date when the *ex parte* application was moved before the High Court. In this regard, counsel referred to the dicta of Peart J. in the *Moynihan v. Dairy Gold Co-Op Society Limited* case, where the judge described the application by a defendant to set aside the renewal of a summons "as being akin to a hearing *de novo* of the application". Counsel also referred to Delaney and McGrath on Civil Procedure, 4th Edition, at para. 2-45.

30. Counsel stated that unfortunately neither he, nor junior counsel, had been instructed at the time the *ex parte* application was moved before the High Court on 14th October, 2019. Accordingly, they could not say for certain whether the argument had been raised before Meenan J. that the summons should be renewed due to the fact that the plaintiff's action against the defendants was not statute barred as of that date. Even if it was assumed that such argument had not been made to the High Court on that occasion, it was submitted that as this was a *de novo* hearing of the application, albeit through the prism of the circumstances that had existed on that date, there was nothing to prevent the plaintiff from raising that argument in answer to the first defendant's application. What the court was being asked to examine was whether the High Court had been correct to renew the summons, having regard to the circumstances that existed at that time.

31. Counsel submitted that it was an important fact, that on the date when the application to renew was made, the plaintiff's action was not statute barred against either defendant. It was submitted that that was a significant fact which the court was entitled to take into account when considering whether it was appropriate to renew the summons. Such consideration had been taken into account by the court on previous occasions. The fact that a plaintiff's action was not statute barred against a defendant, was seen as a significant factor which weighed in favour of allowing the summons to be renewed: see O'Leary v. Walsh [2008] IEHC 253; *Moloney v. Lacey Building and Civil Engineering Limited* [2010] IEHC 8 and *Mangan (APUM) v Dockery* [2014] IEHC 477.

32. Counsel stated that, while inadvertence on the part of a solicitor to the expiry of the period within which a summons could be served, could not constitute on its own a special circumstance justifying renewal of the summons; that ground, coupled with the fact that the plaintiff's action against the defendant at the time that the application to renew was made was not statute barred, could be seen as constituting special circumstances justifying the renewal of the summons. Counsel pointed out that the plaintiff's solicitor had very frankly explained that it had been due to inadvertence on his part that the summons had not been served within the appropriate period. He had set out the circumstances in which such inadvertence had arisen.

33. Counsel also submitted that there was absolutely no prejudice to the first defendant by virtue of the fact that the renewed summons was formally served on the first defendant approximately six months after the last date on which the original summons could have been served on it.

34. It was submitted that the absence of prejudice to the first defendant arose having regard to the following factors: firstly, the first defendant had been notified of the accident within two months of the occurrence of the accident. Secondly, the plaintiff had engaged in correspondence with the first defendant's insurers and had given an accurate description of the accident and the locus of the offending lip. Thirdly, a joint engineering inspection had been carried out within one year of the accident. In these circumstances, the delay in serving the personal injury summons, had had no effect on the ability of the first defendant to investigate the liability aspects of the case. This was not an action in which a defendant was first put on notice of a claim on the date that it received the renewed summons.

35. Counsel further pointed to the fact that in the affidavit sworn on behalf of the first defendant, it had not been alleged that the first defendant had in fact suffered any specific prejudice due to the delay in receiving the summons. While liability would to some extent turn on the evidence of witnesses given at the trial of the action, the essential aspects of liability would be determined by the condition of the locus, which was readily ascertainable to the first defendant and had not changed since the time of the accident. The expert evidence on the state of the locus would determine liability. It was submitted that in these circumstances, there was in reality no prejudice to the first defendant due to the delay on the part of the plaintiff in serving the summons herein.

Conclusions

36. The first issue which arises for determination, is the nature of the hearing of an application brought by a defendant pursuant to O.8, r.2 seeking to set aside the renewal of a summons. The court accepts the submission made by Mr. Sheehan SC on behalf of the plaintiff that on the hearing of such an application, it is in effect a *de novo* hearing. The dictum of Peart J. in the *Moynihan* case, quoted above, is supportive of this conclusion. In addition, the opinion of the learned authors of Delaney and McGrath on Civil Procedure, 4th Edition, as set out at para. 2-45 is also supportive of this proposition.

37. The court also accepts the submission made on behalf of the plaintiff that in considering the defendant's application to set aside the renewal of the summons, the court is obliged to look at the issue through the temporal prism of the date when the *ex parte* application was actually moved before the High Court, subject of course to the consideration of the arguments put forward on behalf of the defendant. That the court must look at it through the temporal prism of the date of the *ex parte* application is logical, because the court is being asked to adjudicate on the delay that existed in relation to service of the summons up to the point that renewal of the summons was sought. The court does not consider the further delay that may have occurred up to the time that it considers the application by the defendant pursuant to O.8, r.2 to set aside the renewal of the summons. Thus, in the present case, the court must look at the situation as of the date of the *ex parte* application on 14th October, 2019, rather than on the date of the hearing of the defendant's application on 29th April, 2021.

38. Having said all of that, the court is of the view that Mr. Buckley SC was correct in his submission that at the hearing of the application pursuant to O.8, r.2, it is not possible for a plaintiff to "graft on" a new factor as a special circumstance, which was not raised at the time of the *ex parte* application.

39. In this case, it is not at all clear whether the issue of the plaintiff's application not being statute barred at the time that the *ex parte* application was moved, was actually raised at the hearing of the *ex parte* application. Mr. Sheehan SC on behalf of the plaintiff, very frankly conceded that he was unable to give a definitive answer to the question as to whether it had been raised at that stage. That was due to the fact that neither he, nor junior counsel, had appeared for the plaintiff at the *ex parte* stage. There was no reference as to whether the plaintiff's solicitor, Mr. O'Carroll, could have shed any further light on the matter.

40. On balance, the court is of the view that the Statute of Limitations point was not raised before the High Court at the *ex parte* application on 14th October, 2019. The court reaches that conclusion for the following reasons: firstly, there is no definitive evidence before the court that it was raised at the *ex parte* stage; secondly, there is no mention of the Statute of Limitations point in the affidavit sworn by Mr. O'Carroll on 10th September, 2019 for the purpose of the *ex parte* application and thirdly, there is no reference to any such argument in the order of the court dated 14th October, 2019. Accordingly, the court finds that on the balance of probabilities, the argument that the plaintiff's action was not statute barred against the defendants and that that supported the case for the renewal of the summons, was not made to the High Court on the *ex parte* application heard on 14th October, 2019.

41. Even if the court is wrong in that and the point was raised in argument, it is clear that it was not regarded by the High Court as constituting a special circumstance which justified the renewal of the summons. This is due to the fact that under O.8, r.1(4), where the court finds that there are special circumstances which justify an extension of the time for service of the summons, such circumstances have to be stated in the order. In this case,

there is no mention of the Statute of Limitations point in the order of the High Court of 14th October, 2019. Accordingly, it cannot be seen as having been one of the "special circumstances" which justified the renewal of the summons. The only special circumstances stated in the order was that an administrative oversight had occurred.

42. Having regard to the finding of the court that the Statute of Limitations point was not raised before the court at the *ex parte* stage and having regard to the fact that even if it was so raised, it was not one of the special circumstances identified by the court justifying renewal of the summons, the court holds that this point cannot be raised now in answer to the defendant's application to set aside renewal of the summons.

43. However, even if I am wrong in finding that the Statute of Limitations point had not been raised at the *ex parte* stage; nor had been accepted by the court at the *ex parte* stage and therefore cannot be raised at this stage; even if it could be raised as a factor which, either by itself, or in combination with other factors, could be said to give rise to special circumstances justifying the renewal of the summons, the court is not satisfied that it does in fact constitute a special circumstance justifying renewal of the summons.

44. In argument at the bar, counsel for the plaintiff relied heavily on the decision in *Mangan (APUM) v. Dockery*, where Costello J. in considering whether to set aside the renewal of the summons, had regard to the fact that as the plaintiff had been profoundly injured as a result of alleged negligence at the time of his birth, he was therefore disabled to such an extent that the Statute of Limitations would effectively never run against him. It was submitted that that fact was one of the factors that had been taken into account by the court as justifying a renewal of the summons pursuant to the terms of the old O.8 of the rules. Having read the decision carefully, the court is of the view that that decision cannot be taken as support for the proposition that once a plaintiff's case is not statute barred against a defendant, the court should on that basis alone, lean in favour of renewal of the summons.

45. In the *Mangan* case there were extensive factors independent of the Statute of Limitations point that could be seen as constituting either "good reason" under the old O.8, or "special circumstances" under the new form of the order. In particular, there was extensive evidence from the plaintiff's solicitor that, having issued the personal injury summons on behalf of her client, claiming damages in respect of alleged negligence on the part of the medical staff at the time of his birth, senior counsel had reviewed the summons prior to its being served on the defendants and had directed that a report should be obtained from a consultant paediatric neurologist. To that end, the plaintiff's solicitor had written to eleven such experts in Ireland, the United Kingdom and Canada. However, none of the specialists were in a position to provide a report. Eventually, the plaintiff's solicitor managed to get a report from another consultant. It was in those circumstances, that the court had to consider the renewal of the summons.

46. While Costello J. did have regard to the fact that the plaintiff's action against the defendants could not be statute barred, having regard to his continuing level of injury and disability; she was also moved by the fact that it had been indicated on behalf of the

defendants that irrespective of whether the summons was renewed, or whether a fresh summons was issued on behalf of the plaintiff, they were going to bring an application to have the proceedings against them struck out on the basis of inordinate and inexcusable delay. It was in those circumstances, that the court refused the application brought by the defendant to set aside the renewal of the summons.

47. The plaintiff also relied on the decision in *O'Leary v. Walsh*, which was a professional negligence action against a number of solicitors, who had previously acted for the plaintiff in relation to a commercial dispute that he had had with the ACC and in connection with the receivership carried out under their direction. The plaintiff's plenary summons had issued on 7th September, 2000. It had been renewed on the *ex parte* application of the plaintiff on 30th January, 2006. The defendants brought motions to set aside the renewal of the summons.

48. In the course of her judgment, Dunne J. (then sitting as a judge of the High Court), seems to have made somewhat contradictory findings in relation to whether the plaintiff's action against the defendants was statute barred. At p.16 of the judgment she stated as follows in relation to the consideration of the balance of hardship:-

> *"The balance of hardship in this case for the plaintiff is quite clear. It is the case that if the summons is not renewed the claim against the defendants is statute barred."*

49. However, on the following page, she stated as follows in relation to the case made against the defendants:-

> *"It will be seen therefore that the negligence alleged against the defendants is very much related to the failure to progress the case and the failure to join the receiver properly as a defendant in the proceedings. In considering the issue in this case, one of the matters to bear in mind is that the claim against the defendants herein is not statute barred. There is certainly no suggestion to that effect on the part of any of the defendants herein."*

50. I think that perhaps the perceived inconsistency can be explained by virtue of the fact that the first quotation refers to the effect on the plaintiff's claim if the renewal of the summons were set aside; whereas the second portion relates to the substantive claim made in the summon itself, which was not alleged to be statute barred at the date when the summons originally issued.

51. Leaving that conundrum aside, it is clear from the judgment that Dunne J. refused to set aside the renewal of the summons due to the fact that the defendants had been aware of the existence of the plaintiff's claim against them; had been informed that the plaintiff was going to adopt a "wait and see" approach, to see whether his other proceedings against the ACC were successful and the defendants had acquiesced in that approach being adopted; and the claim against them was relatively straightforward, in that it concerned their alleged negligence in relation to their handling of his previous

proceedings against the ACC and the receiver. It was in those circumstances that the judge refused to set aside the renewal of the summons.

52. The plaintiff also relied on the decision in *Moloney v. Lacey Building and Civil Engineering Limited*, where Clarke J. (then a judge of the High Court) suggested that, having regard to the objectives sought to be attained by the Statute of Limitations, a distinction could be drawn where applications were made to renew a summons, where the plaintiff was still within time to institute proceedings against the defendant, where he stated as follows at para. 5.11:-

> *"[…] it seems to me that a renewal of a summons outside the limitation period so as to further extend the time (by reference to the limitation period) within which service can be effected, amounts at least to a stretching of the principles behind the existence of a statute of limitations in the first place. Such consideration should, in my view, inform decisions relating to both the question of what might be taken to be a "good" reason for the renewal of a summons and also in weighing the factors that might be put in the balance in considering where the balance of justice lies."*

53. It was also submitted on behalf of the plaintiff that the court should also have regard to the fact that the plaintiff had issued a protective summons, such that the issuing of that summons, in conjunction with the fact that the plaintiff had not been out of time to institute proceedings when he made his *ex parte* application to renew the summons; supported the case for the renewal of the summons. The plaintiff put this submission in the following way in his written submissions at para. 4:-

> *"It is submitted that the instant case is unique in that firstly, it was not statute barred at the time that the summons was renewed and secondly, by way of a belt and braces approach, a second set of proceedings were issued within time on the 31st of October, 2019, to which the first named defendant entered an unconditional appearance on 27th October, 2020, and those proceedings are still extant and are capable of being continued should the first named defendant's application be acceded to".*

54. To deal with these submissions in order; the court does not consider that the fact that the plaintiff's cause of action against the defendants was not statute barred at the time that the *ex parte* application was made, constitutes a special circumstance within the meaning of O.8 to justify the renewal of the summons. If it were the case that the mere fact that a plaintiff's action was not statute barred against a defendant at the time of seeking the renewal of the summons, this would mean that plaintiffs could simply insist on having their summonses renewed, whenever their application for renewal was made prior to the expiry of the relevant limitation period, notwithstanding that there may be no good reason why the summons was not served within the relevant twelve-month period.

55. The rules are quite clear in their terms. Order 8, r.1(4) provides that the court may order renewal of the summons for three months from the date of such renewal inclusive, where

satisfied that there are special circumstances which justify an extension, such circumstances must be stated in the Order. The court cannot see how the mere fact that a plaintiff may be still within time to institute fresh proceedings against a defendant, could constitute a special circumstance justifying the extension of the time within which to serve the original summons.

56. The fact that a plaintiff's case may not be statute barred, means that the plaintiff is in a fortunate position. If the summons is not renewed, he can instruct his solicitor to immediately go to the Central Office in the Four Courts and issue a new summons in identical terms against the defendant. However, the existence of such a facility, does not mean that the original summons should be renewed.

57. The circumstances in the *Mangan* case were quite different to the present case. In that case, there were ample factors that could be seen as being "special circumstances" which would justify the renewal of the summons under the present form of O.8. It is clear from the judgment, that the primary factor which weighed on the mind of the judge, was the inordinate difficulty that the plaintiff's solicitor had had in obtaining the requisite medical report, which had been directed by senior counsel. It was in those circumstances, coupled with the fact that the plaintiff's claim against the defendants could never become statute barred, due to the extent of his disability, and in conjunction with the fact that the defendants had indicated that they intended to bring a motion seeking to strike out the action for inordinate delay, notwithstanding that the limitation period had not expired; that the judge held that it was not appropriate to set aside the renewal of the summons.

58. The court does not see that the fact that the plaintiff may have elected to issue what has been described as a "protective writ" to cover against the eventuality that the renewal of the present summons might be set aside, can be seen as in any way supporting the argument for the renewal of the summons. It does not appear to me to be relevant one way or the other. It may be that the plaintiff's solicitor was very prescient in taking that step. However, I make no finding as to the legality of issuing an identical summons against identical defendants during the currency of an extant summons, as that may fall for determination by another court. However, I am satisfied that the existence of such proceedings, is of no bearing on the issue that is before the court.

59. For the reasons stated herein, the court holds that the fact that the plaintiff's action against the defendants was not statute barred at the time that he made his application to renew the summons on 14th October, 2019, is not relevant to the issue as to whether that renewal should be set aside.

60. Thus, the court is left with the two remaining grounds which are said to constitute special circumstances which justify the renewal of the summons. The first of these is that the summons was not served within the appropriate period due to inadvertence on the part of the plaintiff's solicitor. He very fairly set out in his replying affidavit that he had missed the fact that the summons had not been served due to a combination of facts, being: he had been awaiting nomination of solicitors to act on behalf of the defendants; the files in the office had been transferred onto computer and on a periodic review he had missed

these proceedings, due to the fact that the plaintiff had a very similar name to another plaintiff, whose action he had deliberately withheld progressing for tactical reasons and as a result he had missed the existence of the plaintiff's proceedings. It was not until a review of the paper files was done on 27th August, 2019, that it was realised that the time for service of the personal injury summons in this case had expired some months earlier on 20th May, 2019. It was submitted on behalf of the plaintiff that thereafter, the plaintiff's solicitor had moved with reasonable expedition to have the necessary documents drafted so that the *ex parte* application could be moved before the High Court on 14th October, 2019.

61. The court is satisfied that inadvertence on the part of a solicitor to the expiry of the period within which to serve a summons, cannot be seen as being a special circumstance which justifies the renewal of the summons. The authorities are quite clear that inadvertence on the part of a solicitor will not suffice in this regard: see *Moynihan v. Dairy Gold Co-Op Society Limited* (paras. 38 – 40); *Downes v. TLC Nursing Home Limited* (paras. 48 – 50) and *Murphy v. HSE* (para. 77).

62. The reasons why mere inadvertence on the part of a solicitor will not suffice as a special circumstance are quite clear. Firstly, it is because mere inadvertence cannot be seen as being special, or out of the ordinary, such as is required to bring one within O.8, r.1(4). Secondly, if mere inadvertence was allowed as a special circumstance to justify renewal of a summons, that would effectively render the time limit provided for in the rules, redundant.

63. That is not to say that inadvertence can never be a special circumstance. It is possible that inadvertence may arise due to other circumstances that are in themselves special or unusual. An example of that could be where the solicitor having carriage of the proceedings, is involved in a serious accident in the months leading up to the expiry of the twelve-month period, such that he or she omits to serve the summons within time. If the requisite medical evidence was forthcoming, the court could be persuaded that his, or her inadvertence in serving the proceedings, was excusable due to the intervening event. Such circumstances could also arise if a member of the plaintiff's family were similarly involved in a serious accident, either at home or abroad. Another example would be where the solicitor's office was subject to some form of calamity, such as an extensive fire or flood. In such circumstances the court could hold that there were reasons why the solicitor omitted to serve the summons because due to other intervening serious circumstances his mind was elsewhere at the time. These are only examples and are not exhaustive.

64. In this case, the cause of the inadvertence on the part of the solicitor, while understandable, cannot be seen as being unusual, or out of the ordinary. The court finds that inadvertence is not a special circumstance in this case which would justify the renewal of the summons.

65. Finally, the plaintiff submitted that a factor in favour of the renewal of the summons was the fact that the defendant had not suffered any prejudice as a result of the delay on the

part of the plaintiff in seeking the renewal of the summons and the subsequent service of the summons on the first defendant.

66. The court accepts the argument on behalf of the plaintiff that there was no discernible prejudice to the defendant in the circumstances of this case. The court reaches that finding for the following reasons: the first defendant was notified at a very early stage of the occurrence of the accident and a general description of the circumstances of it was given in the initiating letter, dated 14th February, 2017; the plaintiff gave further details in his correspondence with the first defendant's insurers; there was a joint inspection of the locus at some time between October 2017 and December 2017; liability will turn on the physical state of the locus at the time of the accident, which condition has not changed in the interim. In these circumstances, the court is satisfied that there is no discernible prejudice to the defendant, due to the fact that the summons was not served upon it until 20th November, 2019.

67. In addition, while the first defendant made a vague submission that they were prejudiced due to the delay that would ensue in relation to the hearing of the action and due to the reliance on oral testimony; the court is not satisfied that there is much weight in this argument, due to the fact that liability in this case will turn almost exclusively on the design and construction of the concrete lip at the locus of the accident. In these circumstances, the evidence of witnesses to the accident itself in December 2016, will be of only marginal relevance at the trial of the action.

68. However, the fact that the first defendant may not have suffered any discernible prejudice as a result of the failure of the plaintiff to serve the summons within the appropriate period, is not sufficient to constitute a special circumstance justifying the renewal of the summons.

69. Having regard to the findings of the court in this judgment, the court accedes to the application made on behalf of the first defendant to set aside the renewal of the summons against it, which was made by order of the High Court dated 14th October, 2019.

70. As this judgment is being delivered electronically, the parties will have two weeks within which to furnish written submissions in relation to the final order and on costs and on any other ancillary matters that may arise.